IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 313 OF 2001

1. Mahadeo Nathuram Shirke]
Aged 27 years]
]
2. Raghunath Nathuram]
Shirke, Aged 36 yrs.]
]
3. Rajaram Nathuram]
Shirke, Aged 30 yrs.]
All resident of]
Nandalapur, Taluka]
Karad, Dist.Satara]..Appellants
(Org.Accused
Nos.1 to 3)

Vs.

1. State of Maharashtra]
]
2. Valmik Dhondiram Shirke]
r/o Nandalpur, Taluka]
Karad, Dist.Satara]
Added party as per]
Court's order]
dated 20.12.2001 passed]
in Cri.Application No.]
2087 of 2001.]
]
3. Smt.Chhaya Sambhaji]
Shirke, age 36 yrs.]
]
4. Kum.Varsha Sambhaji]
Shirke, Age 17 yrs.]
]
5. Kum.Vaibhav Sambhaji]
Shirke, Age 15 yrs.]
]
6. Kum.Vaishali @ Rani S.]
Shirke, Age 13 yrs.]
]
7. Kum.Vijay Sambhaji]
Shirke, Age 7 yrs.]
All residing at]
Nandgaon, Tal.Karad,]
Dist.Satara.]
(Respondent nos.4 to 7]
minors through their]
mother and Natural]
Guardian, the Respondent]
No.3 Smt.Chhaya S.Shirke]..Respondents

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Shri.P.P.Hudlikar with Shri.B.K.Raje Advocates for appellants
Shri.D.S.Mhaispurkar, A.P.P. for Respondent no.1-State
Shri.M.S.Mohite with Shri.S.V.Kotwal with Ms.Sharmila Kaushik Advocates for Respondent nos.2 & 3.

....

CORAM : H.L.GOKHALE AND
SMT.V.K.TAHILRAMANI,JJ.
DATE : SEPTEMBER 3,2004

ORAL JUDGMENT: (PER SMT.V.K.TAHILRAMANI,J.)

1. Through this appeal the appellants (original accused nos.1 to 3) challenged the judgment and order dated 27th April, 2001 passed by the learned Additional Sessions Judge, Karad in Sessions Case No. 120 of 2000 (old Sessions Case No. 131 of 1997). By the said judgment and order, all the three appellants have been convicted and sentenced to undergo R.I. for life and to pay a fine of Rs.10,000/- each i/d to suffer S.I. for three months for the offence under Section 302 read with Section 34 of IPC. All the three appellants have also been convicted for the offence under Section 504 read with Section 34 of IPC, 506 read with Section 34 of IPC, 324 read with Section 34 of IPC and 323 read with Section 34 of IPC. For the offence under Section 504 read with Section 34 of IPC, the appellants have been sentenced to suffer R.I. for one year and to pay a fine of Rs.500/- each i/d to suffer S.I. for two weeks. For

the offence under Section 506 read with Section 34 of IPC, the appellants have been sentenced to R.I. for one year and to pay a fine of Rs.500/- each i/d of payment of fine, S.I. for two weeks. For the offence under Section 324 read with Section 34 of IPC, the appellants have been sentenced to R.I. for three years and to pay a fine of Rs.1000/- each i/d of payment of fine, S.I. for three weeks. For the offence under Section 323 read with Section 34 of IPC, the appellants have been sentenced to R.I. for six months and to pay a fine of Rs.500/- each i/d of payment of fine, S.I. for two weeks.

2. The prosecution case briefly stated is as under:

. That the complainant Valmik Dhondiram Shirke P.W.2 resides with his family at Nandlapur near S.C. Industries in Karad Taluka. Deceased Sambhaji Shirke was residing along with his family at Nandlapur. All the three accused are also residing along with their family members at Nandlapur. All the three accused were closely related to Sambhaji Shirke. There were disputes between the family of Sambhaji Shirke and the accused persons on account of some land. Disputes arose on account of consolidation scheme due to which superior and fertile lands of the deceased Sambhaji went to the share of accused persons about

20 years prior to the incident and inferior land of the accused persons came to the share of the deceased Sambhaji Shirke. The relations between accused persons and the deceased Sambhaji Shirke were strained and they were not on talking terms with each other. The accused and the deceased Sambhaji Shirke had a common well and they were taking water from the said common well to supply water to their respective lands as per their shares and as per their turn in rotation. On account of grudge, the accused persons used to pick up quarrels with the deceased Sambhaji Shirke and his family on flimsy grounds. About four years prior to the incident, the accused persons had abused and beat deceased Sambhaji Shirke and his brother Tulshiram and therefore, Sambhaji Shirke had lodged complaint against them in the Police Station.

3. On the date of incident i.e. on 12th June, 1997 at about 8 a.m. the complainant i.e. P.W.2 Valmik and deceased Sambhaji Shirke went to the common well to take bath. At that time, accused Raghunath was standing on the steps inside the well. At that time, accused Mahadeo and Rajaram were standing on the bank of the well. Sambhaji Shirke and Valmik Shirke went into the well to have a bath. At that time, Sambhaji Shirke asked Raghunath for way to enter the well. Raghunath abused deceased Sambhaji Shirke and quarrel

took place between them. P.W.7 Anil Shirke was standing on the bank of the well. Valmik took both Raghunath and Sambhaji outside the well. All the accused persons i.e. Rajaram, Raghunath and Mahadeo started beating deceased Sambhaji Shirke with hands and Sambhaji Shirke also started beating the accused persons. Anil and Valmik settled the quarrel. At that time, accused Rajaram, Raghunath and Mahadeo abused Sambhaji loudly and went to their house. Sambhaji Shirke told P.W.2 Valmik that they will first go to Tulshiram i.e. brother of Sambhaji near brick furnace and thereafter they will go to the Police Station to lodge a complaint.

4. Both Sambhaji Shirke and Valmik Shirke started proceeding towards brick furnace which is about a few minutes distance from the well. The well is on the eastern side of the highway and the brick furnace is on the western side of the highway. Both of them crossed the highway and were proceeding towards brick furnace to Kolhapur side on the highway from western side. When they reached near milestone No. 677, at that time accused Rajaram, Mahadeo and Raghunath came running from their house from front side of Valmik and Sambhaji Shirke. All the three accused were armed with weapons. Accused Rajaram was armed with an axe and accused Mahadeo and Raghunath were armed

with knives. Accused Raghunath assaulted Sambhaji with knife (article 16) near his private organs i.e. in his lower abdomen. Accused Mahadeo assaulted Sambhaji on his chest with knife (article no.3). Accused Mahadeo shouted that Sambhaji should be finished and he should not be kept alive. Then accused Rajaram assaulted Sambhaji with an axe (article no.4). Sambhaji resisted the said assault by his right hand. Accused Mahadeo wanted to give second blow with knife, at that time, witness Valmik caught hold the blade of knife which was in the hand of accused Mahadeo. Accused Mahadeo gave forcible jerk to the knife due to which, Valmik sustained injuries on his right hand. P.W.2 Valmik received injuries on his back and head as accused Rajaram assaulted P.W.2 Valmik on his back and head by the blunt side of the axe.

5. In the meanwhile, P.W.8 Balu Nikam came there and he took the knife from the hands of the accused Mahadeo. Meanwhile P.W.6 Dattatray Lavand, Shivaji Shirke and Shamrao Kumbhar also came there. P.W.6 Dattatray Lavand and Shamrao Shirke snatched away the axe from the hands of Rajaram. Raghunath said that the job of Sambhaji is finished and let us go to the house and he went to his house holding the knife in his hand. Rajaram and Mahadeo also went towards

their house. In the said incident, P.W.2 Valmik Shirke suffered injuries on his hand, back, head and thigh and due to the incident, Sambhaji Shirke became unconscious. Thereafter, Sambhaji Shirke was put in a rickshaw and taken to Krishna Charitable Hospital. There Doctor had examined Sambhaji Shirke and declared him dead. Thereafter, P.W.2 Valmik Shirke went to the Police Station by rickshaw and narrated the whole incident to the police. The said statement was reduced into writing. This is treated as F.I.R. which is at Exhibit-53. The said F.I.R. was recorded at 9.10 a.m. Thereafter, P.W.2 Valmik was taken by the police to cottage hospital where he came to be treated for his injuries. The body of Sambhaji Shirke was sent for post-mortem. The post mortem was conducted on 12th June, 1997 at about 3.10 p.m. The post mortem was conducted by P.W.10 Dr.Salunke and P.W.9 Dr.Sanjay Chivte. The following external injuries were found on Sambhaji Shirke.

1. Abrasion over left angle of mandible 1 inch in diameter. Circular reddish blackish.

2. Contusion over left scapula vertical and oblique 3 x 2 inch with abrasion in centre. Linier 3 x 1/8 inch in

length.

3. Contusion over left side of chest in axilla 3 inch below oblique 4 inch x 3 inch with abrasion at centre.

4. Incised stab wound half inch above and medial to left nipple in 4th space elliptical 1/2 x 1 and 1/2 x 3/4 inch margins clear. Cavity deep.

5. Incised cut wound over left space in between right thumb and index finger. Planter aspect. 2 inch x 1/4 x 1/4.

6. Incised wound stab just left to pubic tubercle. Oblique 1" x 1/4" x Cavity deep. Margins clear red in colour.

Cause of injuries was given as hard and blunt weapon for injury nos.1,2 and 3. Hard and sharp for injury nos.4,5 and 6. Age within 12 hours. In the opinion of the Doctor, all these injuries were ante mortem.

6. On internal examination, it was found that thorax pectoralis major and inter coastal muscle of left side of chest in fourth space was cut obliquely

corresponding to injury no.4.

. The pluera was also torn corresponding to injury no.4. The haemo thorax was seen with about half litre of blood. Right lung was pale and left lung showed laceration/tear in the left middle lobe anteriorily near midline going medially and upwards.

. On internal examination of abdomen, I noticed that rectus sheath was torn corresponding to injury no.6, going upwards and inwards. Perritorium was teared corresponding to injury no.6. Abdominal cavity was filled with blood about two litres. Small intestine was pale with perforation seen in ileum 3 feet away from iliocecal junction with measantrary tear. Injury was elliptical 3/4 inch x 1/4th inch cavity deep lung deep large intestine was pale.

. Cause of death was due to haemorrhagic shock following rupture of left lung and intestine perforation with measenttric tear.

. In the opinion of Doctor, injury nos.4 and 6 with corresponding internal damage will cause death of person in ordinary course of nature. On sustaining injury no.4 and 6 and having suffered blood loss a person can go into shock and death will be immediate

one.

7. After completion of investigation, the charge-sheet came to be filed. The case was committed to the Court of Sessions in the usual manner. During the course of trial, the appellants came to be charged for the offence punishable under Sections 302, 504, 506, 324 and 323 read with Section 34 of IPC. All the accused pleaded not guilty and claimed to be tried. Their defence is that of false implication.

8. During the trial, in all prosecution examined 13 witnesses. Out of the said witnesses, three of them are eye witnesses i.e. Complainant P.W.2 Valmik Shirke, P.W.6 Dattatray Lavand and P.W.8 Balu Nikam. It may be stated here that P.W.2 Valmik is an injured witness.

9. The learned Sessions Judge has relied on the evidence of these three eye witnesses and other evidence in this case and has convicted and sentenced all the three appellants as stated above in para no.1 of this judgment. Hence, this appeal.

10. We have heard Mr.Hudlikar, the learned counsel appearing for the appellants, Mr.Mhaispurkar the

learned A.P.P. appearing for the State, Mr.V.S.Kotwal with Mr.M.S.Mohite, the learned advocate for the injured and heirs of the deceased i.e. respondent nos.2 to 7. The respondent no.2 is the complainant and injured witness in the present case and respondent nos.3 to 7 are the wife and children of deceased Sambhaji Shirke. We have also gone through the entire evidence on record and the impugned judgment. We are constrained to observe that we do not find any merit in this appeal and in our view, the appeal deserves to be dismissed.

11. As stated earlier, the conviction is mainly based on the ocular evidence of the three eye witnesses i.e. P.W.2 Valmik Shirke, P.W.6 Dattatray Lavand and P.W.8 Balu Nikam. We first propose to take the evidence of P.W.2 Valmik Shirke.

12. P.W.2 Valmik Shirke is the complainant in the present case. He is also the injured eye witness in the incident. Since we have set out the prosecution story on the basis of recitals contained in the examination-in-chief of the complainant P.W.2 Valmik Shirke, we only intend to broadly refer to his evidence here. His evidence shows that there were strained relations between the accused and deceased Sambhaji Shirke. On the date of the incident i.e.

on 12th June, 1997 at about 8 a.m. he went to the common well to have a bath. At that time, accused Raghunath and witness Anil were standing on the steps inside the well and accused Rajaram and Mahadeo were standing near the bank of the well. Deceased Sambhaji Shirke asked accused Raghunath for way to enter into the well, whereupon Raghunath abused him in filthy language and quarrel took place between them. However, P.W.2 Valmik Shirke brought both Raghunath and Sambhaji outside the well. All the three accused i.e. Rajaram, Raghunath and Mahadeo started beating Sambhaji with hands and Sambhaji also started beating them. P.W.2 Valmik tried to settle the quarrel between the accused and Sambhaji. Thereupon, Rajaram, Raghunath and Mahadeo abused Sambhaji & went to their house. Sambhaji told Valmik that they will go first to Tulshiram i.e. brother of Sambhaji towards the brick furnace and thereafter they will go to the police station to lodge the complaint. From the well which is on the eastern side of the highway, they proceeded towards brick furnace. After crossing the highway when they reached near milestone no. 677, they saw all the three accused coming running towards them from their front side. All the three accused were armed with weapons. Rajaram was armed with axe (article no.4). Mahadeo was armed with knife (article no.3) and Raghunath was

armed with knife (article no.16). Mahadeo assaulted Sambhaji on his chest by knife and then he shouted to finish Sambhaji and not to keep him alive. Thereafter, Raghunath assaulted deceased Sambhaji with a knife in his lower abdomen. Thereafter Rajaram assaulted Sambhaji by axe. Sambhaji resisted the said assault by his right hand. Mahadeo wanted to give second knife blow, in the meantime, P.W.2 Valmik Shirke caught hold of blade of the knife which was in the hand of Mahadeo. Rajaram assaulted Valmik on his back and head by means of butt end of the axe. In the meanwhile, Mahadeo gave a forcible jerk by which Valmik sustained injuries on his hand due to the knife blade. In the meanwhile, P.W.8 Balu Nikam, P.W.6 Dattatraya Lavand and Shamrao Kumbhar came there. P.W. 8 Balu Nikam snatched the knife from the hands of Mahadeo and P.W.6 Dattatraya Lavand and Shamrao snatched away the axe from the hands of Rajaram. Raghunath then told that job of Sambhaji is finished and let us go to the house and he went towards his house holding knife in his hand. Due to the assault, Sambhaji became unconscious. He was shifted to Krishna Charitable Hospital. There Doctor examined him and declared him dead. Thereafter, P.W.2 Valmik went to the Police Station and lodged complaint Exhibit-53. The said complaint was registered at 9.10 a.m. P.W.2 Valmik has identified

Bermuda (article no.5) and Banyan (article no.6) i.e. the clothes which were on the person of Mahadeo at the time of incident. He has also identified ash pant and banian article nos. 7 and 8 which were on the person of Raghunath at the time of incident. He has also identified Lungi and Banian article nos.9 and 10 which were on the person of Rajaram at the time of incident. This witness has also identified the weapons. He has stated that the knife article no.3 was in the hand of Mahadeo, the knife article no.16 was in the hand of Raghunath and axe article 4 was in the hand of Rajaram at the time of incident.

13. The learned advocate for the appellants has submitted that there are large number of omissions in the evidence of P.W.2 Valmik Shirke and if these omissions are taken into account, then there is hardly anything which would connect the appellants with the crime. We have carefully perused the examination in chief as well as cross-exmaination of witness Valmik. We have noticed that in respect of evidence of P.W.2 Valmik which has been reproduced above, there are no omissions or contradictions. Thus, as far as the evidence of P.W.2 Valmik is concerned, we find the same to be reliable and trustworthy and we have no hesitation in relying on

the same.

14. The second eye witness who has been examined in the present case, is P.W.8 Balu Nikam. P.W.8 Balu was also resident of Nandlapur and just like P.W.2 Valmik, he also knew all the accused persons as they were also from the same village. P.W.8 Balu also knew Sambhaji Shirke. This witness has stated that on 12th June, 1997 at about 8 a.m. he was proceeding towards field known as 'Bighe' for bringing fodder. For reaching the field, he had to come to the highway. When he reached the highway, P.W.6 Dattatraya Lavand met him near S.C.Industry. Dattatraya was proceeding towards Kolhapur side. Both of them started going towards Kolhapur side. This witness has stated that infront of them, Sambhaji and P.W.2 Valmik were also proceeding towards Kolhapur side on the highway. The distance between this witness and Sambhaji was about 10 to 15 feet. At that time, he saw the accused persons were armed with weapons. Accused Mahadeo was armed with knife, Accused Raghunath was armed with knife and Accused Rajaram was armed with an axe. They came infront of Sambhaji. Accused Mahadeo assaulted Sambhaji on his chest by knife and accused Raghunath assaulted with knife to Sambhaji on his lower abdomen. Accused Rajaram assaulted Sambhaji with an

axe. Witness P.W.8 Balu has also stated that P.W.2 Valmik caught hold of the knife which was in the hand of Mahadeo. Rajaram was assaulting P.W.2 Valmik on his backside. Balu Nikam snatched the knife from the hands of Mahadeo. He has stated that P.W.6 Dattatraya Lavand and Shivaji snatched axe from the hands of Rajaram. Sambhaji fell on the ground and he became unconscious. Raghunath ran away from the spot holding the knife in his hand, so also, the other accused left the spot. This witness has stated that the knife which he had snatched from the hand of Mahadeo and axe which was snatched from the hand of Rajaram by Dattatray Lavand and Shivaji, were kept by this witness in his house. He then went to Krishna Charitable Hospital Karad and at the hospital, he came to know that Sambhaji had already expired. Nothing has been elicited in the cross-examination of this witness so as to disbelieve his testimony in respect of the incident and the role played by each of the accused persons.

15. The next witness is P.W.6 Dattatraya Lavand. This witness is a resident of Nandlapur. This witness has stated that he knew all the accused who are residents of same village. He has also stated that he knew Sambhaji who was also resident of Nandlapur. This witness has further stated that on

12th June, 1997 at about 8.15 a.m. he was proceeding towards his field from the highway. While he was proceeding towards Kolhapur side, he met P.W.8 Balu Nikam of his village. They proceeded ahead together. Infront of them, they saw Sambhaji and Valmik were also proceeding towards Kolhapur side. This witness has stated that he saw all the three accused came from the front side of Sambhaji from their house. This witness has further stated that Mahadeo and Raghunath were armed with knives and Rajaram was armed with an axe. He has further stated that Mahadeo gave knife blow on the chest of Sambhaji and accused Raghunath gave knife blow on the lower abdomen of Sambhaji and Rajaram assaulted Sambhaji and Valmik with an axe. Mahadeo wanted to again assault Sambhaji, but at that time, Valmik caught hold the knife. Balu Nikam quickly took out the knife from the hands of Mahadeo. This witness has stated that he took away the axe from the hands of Rajaram. Due to the assault, Sambhaji fell on the ground. Accused then went towards their house. This witness along with P.W.2 Valmik, Tulshiram and others took Sambhaji to the hospital. There, Sambhaji was examined and declared dead. Thereafter, P.W.2 Valmik went to the police station to lodge the complaint. In the cross examination, nothing has been brought out so as to discredit the testimony of this witness.

16. The learned advocate for the appellants has submitted that in the present case, it was deceased Sambhaji, Valmik and others who had come there with weapons to assault the accused persons and in the scuffle, Sambhaji and Valmik received the injuries. We find the defence put forward on behalf of the appellants to be improbable and impossible. We say so after looking to the injuries suffered by Sambhaji which are two incised wounds on the chest and lower abdomen. Besides these two injuries, Sambhaji had one incised cut wound over webspace between the right thumb and index finger 2"x1/4"x1/4". Two contusions one on the left scapula and one on the left side of the chest and one abrasion on angle of mandible. Looking to the nature of the injuries on the body of Sambhaji, we find it difficult to accept the submission made on behalf of the accused that all the injuries to Sambhaji were caused in the scuffle. If the defence version is to be accepted that Sambhaji and Valmik and other 2 to 3 were armed and none from the side of the accused were armed, there would be serious and more injuries on the body of the accused persons. All the accused persons have been sent for medical examination on the very same day of the incident. P.W.10 Dr.Chivate examined them and found that Mahadeo had two injuries on his person i.e.

abrasion on both knee joint and abrasion on palm. Both the injuries were simple in nature. Accused Raghunath had two injuries on his body i.e. small multiple minute abrasion over right elbow joint and small multiple abrasions over back scapula and inner scapular region. Accused Rajaram sustained three injuries one is abrasion on the scapula area, one abrasion on the right arm and abrasion on the right thumb. P.W.9 Dr.Salunke had examined all the three accused persons. He has stated that injuries suffered by all the accused persons were simple in nature. The certificates relating to the injuries suffered by the three accused persons are at Exhibits-69, 70 and 71.

17. Doctor Chivate (P.W.10) also examined the complainant P.W.2 Valmik and he has noticed six injuries on his person. The first is an incised wound on the right palm. Linier abrasion lateral to injury no.1 oblique 4" in length, linier abrasion on the right thigh 8 cm. in length, injury on the right finger of right hand, abrasion on the right scapula and history of pain in the abdomen. In the opinion of Dr.Chivte, injury nos.1,2,3 and 5 were caused by hard and sharp object and injury no.4 was referred to the Surgeon for opinion.

18. From the post mortem notes, we have noticed that Sambhaji was well built and well nourished. If Sambhaji accompanied by Valmik and two other persons had attacked the accused persons and at that time, only Sambhaji and his side were armed with weapons like knife, sticks and axe, and none from the side of the accused were armed, it would not have been possible that Sambhaji and Valmik received a number of injuries and the accused persons received only minor injuries which were simple in nature. Thus, we find no merit in this submission made on behalf of the appellants. Moreover, we have already noted above that we find the testimony of three eye witnesses to be cogent, consistent and reliable and we have no hesitation in relying on the same.

19. In support of the contention that it was deceased Sambhaji, Valmik, P.W.8 Balu Nikam and others who had come armed with weapons and had assaulted the accused persons, the learned counsel for the appellants has relied on the circumstance that it was Balu Nikam who had produced the knife and axe, and it was contended that had the weapons been used by the appellants, then the said weapons would have been found at their house or would have been recovered at their instance but from the fact that the weapons have been produced by the witnesses on

the side of the deceased Sambhaji, it shows that they were ones who had come armed with weapons and thereafter they had produced those weapons before the police. The learned counsel for the appellants has submitted that otherwise there was no reason for the witnesses on the side of the deceased to be in possession of the weapons and produce the same before the police. However, we do not find much force in this submission. The prosecution has given an explanation as to how the weapons came to be in possession of the prosecution witness P.W.8 Balu Nikam who was on the side of the deceased Sambhaji. In the FIR itself which is given by Valmik within an hour of the incident, it has been mentioned that accused Mahadeo was armed with knife, Raghunath was armed with an axe and after the assault on Sambhaji by all the three accused persons, P.W.8 Balu Nikam took out the knife from the hands of the Mahadeo and Shamrao and P.W.6 Dattatraya Lavand took away the axe from the hands of Rajaram. Valmik has also stated so in his evidence before the Court. His evidence on this aspect is supported by the evidence of P.W.6 Dattatray Lavand and P.W.8 Balu Nikam. P.W.6 Dattatraya has stated that he had taken out axe from the hands of Rajaram and P.W.8 Balu Nikam had taken out knife from the hands of Mahadeo. So also, P.W.8 Balu has stated that he snatched knife from the hands

of Mahadeo and axe was snatched from the hands of Rajaram by P.W.6 Dattatraya Lavand and Shamrao. This witness has further stated that both these weapons were kept by him in his house and lateron, he produced the knife and axe before the police in presence of panchas. The panchnama relating to the producing of weapons by this witness is at Exhibit-51. Thus, the circumstances in which axe (article no.4) and knife (article no.3) came in possession of the prosecution witnesses, has been explained by the prosecution not only in the FIR which has been lodged immediately after the incident but also in the evidence of P.W.2 Valmik, P.W.6 Dattatraya Lavand and P.W.8 Balu Nikam respectively. Just because Balu Nikam produced the knife (article no.3) and axe (article no.4) it cannot be said that they i.e. Sambhaji, Balu Nikam and others had come armed with those weapon and they assaulted the appellants. From the evidence on record, it is clear that only the appellants were armed with knife Article no.3 and Article no.4.

20. The learned counsel for the appellants has submitted that there is some discrepancy in respect of the place where the weapons had been kept and from the place from where they had been produced by P.W.8 Balu Nikam. It is submitted that this raises doubt

about P.W.8 Balu Nikam producing the weapons. It is further submitted that P.W.8 Balu Nikam in his examination in chief states that axe and the knife were kept by him in his house. So also, in the panchnama, it is stated that weapons were kept in his house whereas in the cross-examination of P.W.8 Balu Nikam, it has come on record that knife and axe were kept in the cattle shed on the 'Mala' (loft). It was submitted that this discrepancy raises doubt in relation to the production of the weapons. It is submitted that though panchnama shows that weapons were kept in the house of Balu Nikam, this witness has stated that they were kept in the cattle-shed. However, we see no material discrepancy because from the evidence of P.W.8 Balu Nikam, it is clear that he owns two houses one in the village and one in the field. He has further stated that the house in the field is used for cattle shed. P.W.8 Balu Nikam has clearly stated so in his evidence. Thus, though the weapons may have been kept in the cattle shed, it is clear that P.W.8 Balu Nikam refers to his house in the village as well as in the field which is used as cattle shed as his house. Thus, this discrepancy would not be of any help to the defence.

21. The learned counsel for the appellants has further submitted that there is no evidence to show

as to from where the accused had got the weapons. Thus, he has submitted that, it is clear that it was the deceased Sambhaji, Valmik Shirke and others who had got the weapons. However, on perusal of the evidence of three eye witnesses i.e. P.W.2 Valmik, P.W.6 Dattatray Lavand and P.W.8 Balu Nikam and one more witness i.e. P.W.7 Anil Shirke, it is clear that after the first incident at the well, the accused went away giving abuses to Sambhaji and uttering threats to him and they had gone to their house and immediately thereafter they came running armed with weapons from front side of Sambhaji and Valmik. P.W.2 Valmik Shirke has clearly stated that after the incident at the well, Rajaram, Raghunath and Mahadeo abused in filthy language and went to their house. From this, it is clear that all the accused persons immediately after the incident at the well, had gone to their house. This evidence is supported by the evidence of P.W.6 Dattatraya Lavand who has stated that when he was proceeding towards his field, he saw Sambhaji and Valmik Shirke walking a little ahead of him and Balu Nikam. At that time, he saw that all the three accused persons came running from front side of Sambhaji from their house. The witnesses further stated that Raghunath and Mahadeo were armed with knives and Rajaram was armed with axe. Thus, from this it is clear that all the

accused came running from their house armed with weapons. So also from the evidence of P.W.8 Balu Nikam, it is seen that when he and P.W.6 Dattatray Lavand were proceeding on the highway towards Kolhapur side, they saw Sambhaji and Valmik a little ahead of them and at that time, accused came running from their house. All the accused were armed with weapons i.e. Mahadeo and Raghunath were armed with knives and Rajaram was armed with axe. Besides this, we also have the evidence of P.W.7 Anil Shirke. This witness Anil Shirke has stated that he was present at the time of incident at the well. He has further stated that he and Valmik intervened in the quarrel which took place at the well. Thereafter, all the three accused left the spot and went to their house. While going they were abusing and saying that they will see to Sambhaji and the accused went to their house. Looking to the evidence of these four witnesses, there is no merit in the contentions made on behalf of the defence that there is nothing to show that as to from where the accused persons got weapons and it was Sambhaji, Valmik and other persons who had come to the place armed with weapons.

22. The next submission which has been made on behalf of the appellants is that no papers relating to the medical examination and treatment of Sambhaji

at Krishna Charitable Hospital, Karad have been brought on record nor any Doctor has been examined who has examined and treated deceased Sambhaji in the Krishna Charitable Hospital at Karad. It is submitted by Shri.Hudlikar, the learned counsel for the appellants that Sambhaji had suffered two major injuries i.e. one in the chest and one in the lower abdomen. If these two injuries had been promptly treated, Sambhaji could have been saved. In this connection, he has relied on the evidence of P.W.9 Dr.Chivte wherein he has stated that in respect of the injuries to the lung and injury on the lower abdomen if proper and correct treatment is given, the patient can recover. Thus, he has submitted that it is clear that no proper treatment was given to Sambhaji at Krishna Charitable Hospital and therefore, Sambhaji had expired. In respect of this contention, Shri.Mhaispurkar, the learned A.P.P. has brought to our notice the evidence of the Investigating Officer wherein he has stated that there was no entry in Krishna Charitable Hospital at Karad about the death of Sambhaji and therefore, he did not seek any report from the said hospital. Moreover, from the evidence of P.W.2 Valmik, it is clear that incident took place at about 8 a.m. Thereafter, Sambhaji was taken to Krishna Charitable Hospital by rickshaw. There Doctor examined Sambhaji

and declared him dead. Thereafter, he went to the police station and his F.I.R. came to be lodged. The said F.I.R. is lodged at 9.10 a.m. From the F.I.R. it is clear that at 9.10 a.m. i.e. within an hour of the incident, Sambhaji was already dead. From the evidence of P.W.2 Valmik and from the evidence of P.W.6 Dattatraya Lavand, it is clear that immediately after the incident, Sambhaji was taken to the hospital and on being examined there he was declared dead. Dattatray was one of the persons who had taken Sambhaji to the hospital. It is clear that as soon as Sambhaji was taken to hospital, he was already found dead, in such circumstances, there was no question of giving any treatment to Sambhaji and therefore, obviously no papers relating to the treatment of Sambhaji would have been prepared and thereafter, produced before the Court. In the facts of the present case, it is clear that Sambhaji did not die due on account of negligence of the doctors who treated him at Krishna Charitable Hospital.

23. The contention of the learned counsel for the appellants that death of Sambhaji had occurred due to the negligence on the part of the Doctor who treated him and not due to the actual act of the accused persons, cannot be accepted specially in view of the explanation given in Explanation (2) of Section 299

of IPC which reads as under:

. "Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented."

. On reading the said explanation, it is quite clear that where death is caused even if the person could have been saved by resorting to proper remedies and skilful treatment and the death might have been prevented, the person who has caused the bodily injury shall be deemed to have caused death. In the present case, from the evidence of P.W.2 Valmik and P.W.8 Balu Nikam it is clear that the deceased was immediately taken to hospital and he was already dead by the time he was examined by the Doctor. Thus, on both the counts, there is no merit in the contention raised on behalf of the appellants.

24. Shri.Hudlikar, the learned counsel for the appellants has submitted that only one injury was caused to Sambhaji i.e.in the lower abdomen which had

occurred in the scuffle and the second injury i.e. injury in the chest was not at all caused to Sambhaji. It is submitted that Sambhaji did not sustain any injuries at all on his chest. The learned counsel for the appellants has submitted that the evidence of Doctor i.e. Dr. Chivte (P.W.9) that Sambhaji had suffered injury on his chest, cannot be believed so also the post-mortem notes also cannot be believed. In support of this contention, he has placed reliance on the evidence of Dr.Chivte P.W.9 who has stated that due to injury no.4 i.e. incised stab wound half inch above and medial to left nipple in 4th space elliptical 1/2 x 1 and 1/2 x 3/4 inch margins clear, cavity deep, the pleura was torn, the left lung showed, laceration/tear in the left middle lobe anteriorily near midline going medially and upwards. Shri.Hudlikar has specifically placed reliance on the evidence of Dr.Chivte wherein he has stated that there is no middle lobe in the left lung. It was submitted that as there is no middle lobe to the left lung, therefore, the injury is on nonexistent part and therefore, it was argued that consequently, there was no injury on that part of the body i.e. chest. However, if one peruses the evidence of the two Doctors i.e. P.W.9 Dr.Chivte and P.W.10 Lila Salunke, it is seen that Dr.Chivte has stated that it is true that usually there is no

middle lobe to the left lung of human being and this is uncommon thing. However, from the evidence of Dr. Salunke, it is clear that it is not correct to say that there is no left middle lobe in any human body. The fact that Sambhaji had sustained injury on chest is seen not only from the inquest panchnama and Post mortem notes, but also from the evidence of the two Doctors P.W.9 and P.W.10. No doubt, normally, there may not be a middle lobe in the left lung, but from the evidence of Dr.Salunke it is clear that there are cases where there is a middle lobe to the left lung in a human body. The fact that there was injury to the chest of Sambhaji and there were internal injuries leading to tear in the pluera and tear to the lung of Sambhaji, cannot be negated looking to the evidence on record. Thus, we do not find any merit in this submission made on behalf of the defence.

25. Thereafter, it was submitted by Shri.Hudlikar the learned counsel appearing for the appellants that there was no motive for the accused persons to commit the offence and there would not be any reason for them to have grudge against Sambhaji as under the Land Consolidation Scheme, the accused got better lands and therefore, it was only Sambhaji who would have a grudge against the accused persons. However,

in this context, it is to be noted that there were strained relation between the accused and Sambhaji for the last over 20 years. Some incidents had taken place even earlier due to which Sambhaji had lodged complaints. Though, Sambhaji and accused persons were closely related, none from the house of accused attended the marriage or funerals in the house of Sambhaji and vice versa. From this, the extent of enmity between Sambhaji and the accused persons can be seen. Due to this enmity, there was constant grudge in the mind of the accused persons as well as in the mind of Sambhaji against each other. The incident in which Sambhaji was murdered, was preceded by the incident at the well wherein even though Valmik and Anil separated Sambhaji and the accused persons, the accused persons left the place abusing Sambhaji stating that they would see him and immediately thereafter, the accused had gone to their house and came back armed with deadly weapons and attacked Sambhaji. Thus, it cannot be said that there was no motive for the accused persons to attack Sambhaji. In any event, even if the prosecution does not succeed in proving the motive for the assault on Sambhaji by the accused persons, that would not in any way shake the prosecution case. We are supported in this view by the decision of the Supreme Court in the case of **State of Himachal Pradesh Vs. Jeet Singh**

reported in Judgment Today 99 (2) S.C. 99 wherein it is observed in para 33 that "it is a sound principle to remember that every criminal act was done with a motive but its corollary is not that no criminal offence would have been committed if prosecution has failed to prove the precise motive of the accused to commit it. When the prosecution succeeded in showing the possibility of some ire for the accused towards the victim the inability to further put on record the manner in which such ire would have swelled up in the mind of the offender to such a degree as to impel him to commit the offence cannot be construed as a fatal weakness of the prosecution. It is almost an impossibility for the prosecution to unravel the full dimension of the mental disposition of an offender towards the person whom he offended."

26. Mr.Hudlikar, the learned counsel for the appellants has further submitted that Rajaram had not inflicted any blows on Sambhaji. In support of this contention, he has relied on the medical evidence. He has submitted that there is no injury on the body of Sambhaji which is attributable to an axe and thus, it is clear that Rajaram did not share the common intention of the other two accused persons i.e. Mahadeo and Raghunath. Mr.Mhaispurkar, the learned A.P.P. has pointed out that P.W.2 Valmik has clearly stated that accused Rajaram assaulted Sambhaji by

means of an axe and Sambhaji resisted the said assault by his right hand. He has also pointed out that in the post mortem note, it is clear that on the right hand of Sambhaji, there is an injury which is consistent with the evidence of Valmik. The said injury is incised cut wound over web space in between right thumb and index finger planter aspect 2"x1/4"x1/4". This injury is consistent with assault by axe. Both the Doctors have nowhere stated that the injury near the thumb cannot be caused by axe. Moreover, it is pertinent to note that Valmik has stated that Rajaram assaulted Sambhaji by axe. Sambhaji resisted the assault by right hand. From this evidence, it is clear that Rajaram did indeed assault Sambhaji.

27. Even assuming for the sake of argument, that Rajaram did not assault Sambhaji with axe, it is pertinent to note that all the three witnesses P.W.2 Valmik, P.W.6 Dattatray Lavand and P.W.8 Balu Nikam, have stated that all the three accused came armed with weapons. At that time, Mahadeo and Raghunath were armed with knives and accused Rajaram was armed with an axe. In this connection, it would be advantageous to reproduce the evidence of P.W.2 Valmik and P.W.7 Anil Shirke who were present at the well, when the earlier part of the incident took

place. P.W.7 Anil has stated that when the quarrel took place between the accused and Sambhaji at the well, this witness and P.W.2 Valmik separated the quarrel, at that time, the accused persons left the place abusing Sambhaji that they will see him and thereafter accused went to their house. Immediately, thereafter, the accused persons have come back armed with weapons and they have assaulted Sambhaji. Even assuming for the sake of arguments that accused Rajaram did not give any blow to Sambhaji, from the fact that after abusing Sambhaji, a threat was given that they will see him and thereafter, all the three accused left the spot and came back armed with dangerous weapons, shows that accused Rajaram shared the common intention with the other two accused persons. In this connection, useful reference may be made to a decision of the Supreme Court in the case of **Parasa Raja Manikyala Rao & Anr. Vs. State of A.P. reported in 2004 ALL MR (Cri.) 267 (S.C.)**. In the said judgment, it has been held in para 12 of the judgment that "common intention' implies pre-arranged plans and acting in concert pursuant to pre-arranged plan..... To constitute common intention, it is necessary that intention of each one of them be known to the rest of them and shared by them." Common intention in most cases, has to be inferred from the act, conduct or other relevant circumstances of the

case in hand. In the present case, from the act, conduct and other relevant circumstances of the case which have been brought on record, the totality of the circumstances when taken into consideration, clearly leads to the conclusion that Rajaram shared the common intention of the other two accused persons. We have gone through the submission that the role of Rajaram is limited but on perusal of evidence on record, we are constrained to observe that Rajaram did share the common intention of the other two accused. In our view, the learned Judge has rightly convicted not only Mahadeo and Raghunath but also Rajaram for the offence under Section 302 read with Section 34 of IPC.

28. Reliance has been placed on behalf of the appellants on the evidence of defence witness D.W.1 Anna Govind Shirke. We have carefully perused the evidence of this witness. It is true that this witness has stated that deceased Sambhaji, P.W.2 Valmik, Tulshiram and P.W.6 Dattatray Lavand came to the spot armed with sticks. Sambhaji rushed towards Mahadeo. He was followed by Valmik and Tulshiram. They were armed with sticks and they started beating. Sambhaji was armed with knife and he tried to assault Mahadeo. On seeing this, Rajaram and Raghunath rushed towards the house of Hanmant Shirke i.e. to

the spot. This witness followed Rajaram and Raghunath. There was scuffle between Sambhaji and Mahadeo. Tulshiram and Valmik started beating Raghunath and Rajaram with sticks. Then Sambhaji raised knife to assault Mahadeo, at that time, Mahadeo caught hold hand of Sambhaji. Sambhaji was all the while pressing his hand towards earth and Mahadeo was raising his hand upward and it happened 1 to 2 times. Thereafter, this witness heard noise and he saw that Sambhaji fell on the ground. However, as far as evidence of this witness is concerned, he does not clearly state that as to how Sambhaji received injuries. Moreover, from the evidence of this witness, it has come on record that in the year 1994-95, he had contested election from the same ward from where Sambhaji had won and this witness was defeated. After election, Sambhaji became sarpanch. This witness has stated that he has stood surety for Mahadeo when the bail was granted to Mahadeo by the Sessions Court. It may be stated here that the bail granted in this case to Mahadeo by the Sessions Court came to be cancelled by the High Court. Even in the High Court, this witness had filed affidavit on behalf of Mahadeo. Though this witness and Sambhaji are from the same village, he has admitted that he did not attend the funeral of Sambhaji. From the evidence of P.W.2 Valmik, it has come on record that

though Sambhaji and accused were closely related, persons from the side of accused did not attend functions and funerals in the house of Sambhaji and vice versa. Thus, from all these facts, it is clear that defence witness Anna Shirke is clearly an interested witness. On perusal of his evidence, it does not inspire confidence and we do not find his evidence to be worthy of any reliance.

29. Moreover, it is seen that cross complaint had been lodged by appellant Rajaram against Sambhaji (deceased) P.W.2 Valmik and Tulshiram. In the said complaint which is at Exhibit-77, it has been stated that on 12th June, 1997 at about 8 a.m. accused Rajaram, Raghunath and Mahadeo went to the common well. Sambhaji and Valmik came there. On account of entering into the well, there was a quarrel between Sambhaji and Raghunath. On account of this, their cousin brothers Sambhaji and Valmik assaulted Rajaram and Raghunath with sticks. Thereafter, they came to the road and again Sambhaji and his brother Tulshiram and Valmik assaulted all of them with sticks. It is pertinent to note that in this complaint which is treated as N.C. there is no reference of Sambhaji holding any knife as is now contended by the defence. However, in this connection, the learned counsel for the appellants has submitted that their complaint was

not properly recorded by Police Constable Anandrao Sawant (P.W.12). However, on perusal of the evidence of Anandrao Sawant who recorded the complaint of Rajaram, we find that there is no whisper of any suggestion put to this witness that he did not record the complaint (Exhibit-77), as stated by Rajaram. Since it was this person who had recorded the complaint of Rajaram, it ought to have been put to this witness that complaint as stated by Rajaram, was not recorded by this witness.

30. Besides the evidence of the three eye witnesses whom we find to be completely reliable and trustworthy, there is other evidence on record which involves the appellants. All the three accused came to be arrested on the very day of the incident and at the time of their arrest, the clothes on their persons were found to have blood stains. The said clothes came to be seized under panchnama Exhibit-61. The panch witness in relation to the seizure is P.W.5 Suhas Gajanan Kumbhar. Nothing has been elicited in the cross examination of this witness so as to discredit his testimony. From the evidence of this witness P.W.5 Suhas Kumbhar, it has come on record that baniyan and Bermuda articles 5 and 6 came to be seized from the person of Mahadeo. The said articles were blood stained. Blood stained baniyan and ash

colour pant articles 7 and 8, which were on the person of accused Raghunath came to be seized. So also blood stained baniyan and black strips lungi which were on the person of accused Rajaram came to be seized. The said clothes have been identified by this witness as also by P.W.2 Valmik. The learned A.P.P. has submitted that all these articles were sent to C.A. for chemical analysis and as per the C.A. report, human blood of 'B' group was found on all the articles except on article no.6 i.e. Bermuda which was on the person of Mahadeo at the time of incident. Though the group of blood on the bermuda was human, the group of the blood on the bermuda could not be detected and it is found to be inconclusive. He has further submitted that the blood group of Sambhaji was also 'B'. Thus, this circumstance also connects all the three accused with the crime.

31. Besides the above evidence, there is recovery of knife at the instance of appellant Raghunath. As per the evidence of panch witness P.W.3 Prakash Nalavade, he was called to the police station. Accused Raghunath was present there and Raghunath made a statement that he had concealed knife in the fodder stack near his house and he will show the same to them. Accordingly, he led them to the spot where

accused Raghunath had concealed the knife. On reaching the said spot which is 20 feet from his house,there was a fodder stack. Accused Raghunath inserted his hand in the heap of fodder and took out the knife. The said knife (article no.16) came to be seized. The Memorandum panchnama and Seizure panchnama were prepared accordingly. The said panchnamas are at Exhibits-56 and 57. There is nothing in the cross examination of this witness so as to discredit his testimony on the point of recovery of knife at the instance of appellant Raghunath. The said knife was blood stained. It was sent to C.A. and as per C.A. report (Exhibit-87) the said knife was found to have human blood. No explanation has been given on behalf of the accused for finding human blood on the said knife.

32. Thus, it is seen that there is sufficient material to implicate all the accused for the offence under Section 302 read with Section 34 of IPC. From the evidence of P.W.2 Valmik, P.W.6 Dattatray Lavand and P.W.8 Balu Nikam, there is sufficient evidence on record to show that the accused persons had also caused injuries to Valmik. However, we find that the learned Sessions Judge has convicted the accused for the offence under Section 323 read with Section 34 of IPC as well as Section 324 read with Section 34 of

IPC for causing injuries to P.W.2 Valmik. Separate sentences have been imposed under these two Sections against all the three accused. However, in view of the fact that injuries were caused to Valmik with dangerous weapons like knife, we find that only the conviction under Section 324 read with Section 34 of IPC is sufficient. So far as conviction for the other offences is concerned, there is sufficient evidence on record to show that the appellants are guilty of offence punishable under Section 504 and 506 read with Section 34 of IPC.

33. In view of the above, we confirm the judgment and order of conviction recorded by the learned Additional Sessions Judge, Karad, dated 27th April, 2001 passed in Sessions Case No. 120 of 2000 (old Sessions Case No. 151 of 1997) for the offence under Sections 302, 324, 504 and 506 r.w. Section 34 of IPC. However, we set aside the conviction and sentence for the offence under Section 323 read with Section 34 of IPC. The rest of the conviction and sentences are maintained. It is informed that the appellant Rajaram is on bail. The learned counsel for the appellants seeks eight weeks time to surrender on behalf of the appellant-Rajaram. The learned A.P.P. leaves it to the Court to pass appropriate order. In view of the request made on

behalf of appellant-Rajaram, we grant eight weeks time to him to surrender.

. The appeal is disposed of accordingly in the above terms.

[H.L.GURKHA,J.]

[SMUT.V.K.TAHILRAMANI,J.]

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO.313 OF 2001

Office Notes, office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders

Shri.P.P.Hudlikar with Shri.B.K.Raje Advocates for appellants
Shri.D.S.Mhaispurkar, A.P.P. for Respondent no.1-State
Shri.M.S.Mohite with Shri.S.V.Kotwal with Mrs.Sharmila Kaushik Advocates for Respondent nos.2 & 3.

CORAM : H.L.GOKHALE AND SMT.V.K.TAHILRAMANI,JJ.
DATE : SEPTEMBER 3,2004

. For the reasons mentioned separately in the judgment, the following operative part of the judgment is passed:

. We confirm the judgment and order of conviction recorded by the learned Additional Sessions Judge, Karad, dated 27th April, 2001 passed in Sessions Case No. 120 of 2000 (old Sessions Case No. 151 of 1997) for the offence under Sections 302, 324, 504 and 506 r.w. Section 34 of IPC. However, we set aside the

conviction and sentence for the offence under Section 323 read with Section 34 of IPC. All the appellants are acquitted of the offence under Section 323 read with Section 34 of IPC. The rest of the conviction and sentences are maintained. It is informed that the appellant Rajaram is on bail. Appellant Rajaram shall surrender to custody and undergo the remaining period of imprisonment. The learned counsel for the appellants seeks eight weeks time to surrender on behalf of the appellant-Rajaram. The learned A.P.P. leaves it to the Court to pass appropriate order. In view of the request made on behalf of appellant-Rajaram, we grant eight weeks time to him to surrender.

. The appeal is disposed of accordingly in the above terms.

[H.L.GOKHALE,J.]

[SMT.V.K.TAHILRAMANI,J.]